LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1143

CARLE & MONTANARI, INC.,

Petitioner,

against

AMERICAN EXPORT ISBRANDTSEN LINES, INC.
and JOHN W. McGRATH CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES M. LEONARD,
MARTIN J. McHUGH,
Counsel for Respondent, McGrath,
70 Pine Street,
New York, N. Y. 10005.

M. E. DE ORCHIS,
Counsel for Respondent, American Export,
80 Broad Street,
New York, N. Y.

TABLE OF CONTENTS

	PAGE
Statement	1
The Facts	2
Argument	2
Conclusion	8
Order Denying Petition for Rehearing	9
Order Denying Petition for Rehearing in Banc	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CARLE & MONTANARI, INC.,

Petitioner,

against

AMERICAN EXPORT ISBRANDTSEN LINES, INC. and JOHN W. McGRATH CORPORATION,

Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents ask that this Court deny Petitioner's application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Statement

This admiralty action sought to recover damages for certain cargo, a case of machinery, which had been shipped aboard the S.S. EXPORTCHALLENGER to New York City. Petitioner is the consignee of the cargo.

During the course of discharge at New York, Respondent McGrath negligently damaged the case.

---

* Though the carrier, American Export Isbrandtsen Lines, Inc. was a party to all proceedings both in the District Court and in the Court of Appeals, the caption of the Petition for Certiorari lists only John W. McGrath Corporation as a Respondent. Respondents are unaware of the reason. No notice pursuant to Rule 21(6) has been served by Petitioner. This brief is filed by Respondents jointly.

Petitioner and Respondents entered into a stipulated set of facts setting forth the above. Petitioner sought to recover damages in excess of $500.00. Respondents claimed that petitioner's recovery was to be limited to $500.00—the "package limitation" under the bill of lading.

A motion for summary judgment was made, using the stipulated facts. The District Court granted Petitioner judgment in the amount of $500.00, applying the "package limitation" provisions of the bill of lading.

Petitioner appealed to the United States Court of Appeals for the Second Circuit.

The decision of the Lower Court was affirmed unanimously (p. 17, Petitioner's appendix).

Thereafter petitioner sought from the Court of Appeals a rehearing and a rehearing *en banc,* both of which were denied (pp. 9-10, *infra*).

The Facts

To the extent that the facts are relevant and significant, they will be found set forth in the opinion of the District Court (Judge Bonsal) on pages 12 through 16 of Petitioner's appendix.

The specific clauses of the bill of lading which bear upon the issues herein are also to be found in the District Court's opinion (pp. 13-14, Petitioner's appendix).

Argument

In respect to the disposition made of Petitioner's motion below for summary judgment, Petitioner contends that the District Court and the entire panel* of the Court of Ap-

---

*As noted *infra*, the Petition for re-hearing *en banc* by the Court of Appeals was denied.

peals for the Second Circuit were in error. Petitioner bases this position upon its assertion that the result reached below is in contravention of the decision of this Court in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297.

Respondents, on the contrary, submit that there is no conflict whatsoever between the actions taken by the Courts below and the decision of this Court in the *Herd* case.

The facts pertaining to the instant action are not in dispute, having been the subject of a stipulation among the parties (there were three parties in the Court below, including the shipowner). The District Court and the Court of Appeals were concerned solely with the legal effect which those operative facts produced.

The parties were (and are) agreed that:

A. Damage was done to Petitioner's case of machinery.

B. The damage was occasioned by virtue of negligence on the part of Stevedore's employees.

C. The goods were in the course of shipment under a Bill of Lading issued by the Carrier, which Bill of Lading was submitted as an exhibit to the Courts below.

In the lower Courts, Petitioner espoused the views (1) that the principles of contract construction precluded any interpretation of the Bill of Lading which would permit to Stevedore the benefits of the package limitation and (2) that even were the writing to be so construed, decisional law denied to Stevedore the protection of a limited liability.

Now, apparently Petitioner has abandoned the former of these two views (Cf. p. 8—Petition) and relies solely upon the claim that the decisional law of this Court prohibits any extension of the so-called "package limitation"

for the benefit of a stevedore or other independent contractors retained by the shipowner to perform services for the goods.

The Shipper, of course, had the option of paying an adjusted freight rate and thus securing for itself the increased protection of a higher valuation (cf. p. 16—Petition). It did not choose to do so. This Court has uniformly held that where a carrier permits actual value to be declared and agreed upon by payment of a higher freight rate, at the Shipper's option, the Shipper (or his successor in interest) will be estopped from asserting a higher maximum value than that customarily contained in the bill of lading, *Hart* v. *Pennsylvania Railroad,* 112 U. S. 331; *Ansaldo San Giorgio I* v. *Rheinstrom Brothers Co.,* 294 U. S. 494; *Kansas City Southern Railway Co.* v. *Carl,* 227 U. S. 639.

In *Ansaldo San Giorgio I* v. *Rheinstrom* (quoted with elisions in the Petition), this Court said, of an optional valuation clause:

> "The damages are computed in the usual way without reference to the stipulation, but if when so computed they exceed the agreed limit of value, no recovery of the excess may be had. Such a stipulation, we have said, is not enforcible unless the shipper, for agreeing to such a limitation of the carrier's liability, receives a consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation; or, as has been said, the rate is tied to the release. Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence. *The agreement as to value, in consideration of carriage at the lower rate thus obtained, is held to estop the shipper from demanding damages in excess of the agreed value.*" (Emphasis supplied.) 294 U. S. 496, 497.

In *Kansas City Southern Railway Co.* v. *Carl, supra,* it was said:

> "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? . . . A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law." 227 U. S. 639, 650.

And in *Hart* v. *Pennsylvania Railroad,* this Court observed:

> "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." 112 U. S. at p. 343.

In view of Petitioner's contention that the fact of Stevedore's negligence calls into play a rule of strict construction, assertedly fatal to the "package limitation" clause, it is noteworthy that, in both the *Hart* and *San Giorgio* cases, the claims made therein were bottomed on negligence.

In the *Herd* case (*Robert C. Herd & Co.* v. *Krawill Machinery Corp.,* 359 U. S. 297) upon which Petitioner

claims to rely, the damage was also occasioned by negligence (this time, stevedore's negligence).

True enough, the stevedore there was denied the protection of the "package limitation" clause, but only because the language of the Bill of Lading did not adequately encompass the stevedore within the scope of the clause.

For purposes of its petition, Petitioner does not dispute the conclusion of the lower Courts that the language in the Bill of Lading, in the case at bar, *does* include the Stevedore as a beneficiary.

The sole thrust of Petitioner's argument would, therefore, seem to be that, even conceding that the language of the Bill of Lading does establish a valuation (or "package limitation") which bears on claims made upon Stevedore, the *Herd* case denies the right of Stevedore to become such a beneficiary under any circumstances.

With specific reference to the position of a stevedore *vis-a-vis* claims made on behalf of cargo, this Court was careful to point out in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297:

> "We are unable to agree with that conclusion for we think it runs counter to a long-settled line of decisions of this Court. From its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, *unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged.* In Osborn v. Bank of the United States, 9 Wheat. 738, 843, it was said that an agent 'is responsible for his own act, to the full extent of the injury [caused thereby]'." (Emphasis supplied) 359 U. S. at p. 303.
>
> • • • • • •
>
> "There is, thus, nothing in those provisions to indicate that the contracting parties intended to limit

> the liability of stevedores or other agents of the carrier for damages caused by their negligence. *If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract.*" (Emphasis supplied) 359 U. S. at p. 302.

It is clear that this Court has never deviated from a clear recognition of the principles applicable to the case at bar:

1. A Bill of Lading clause offering a fixed ($500.00) valuation in exchange for the payment of a lower freight rate is valid and ethically sound.

2. The stevedore may enjoy the benefit of the "package limitation", if the parties express such intention in the writing.

The District Court quite correctly held that the settled law is that the parties to a bill of lading may agree that the value of goods is no more than $500.00 (in the absence of contrary arrangements) and that this valuation clause may be extended to a stevedore, provided the agreement so states. The District Court further held that this agreement did include the Stevedore as a beneficiary of this agreement.

Petitioner has failed to demonstrate any reason why such an agreement cannot be made. It does not, on this Petition, contest the conclusion of the District Court that the words of the writing did include the Stevedore.

The actions of the District Court and of the Court of Appeals are preeminently correct and should be sustained.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

JAMES M. LEONARD,
MARTIN J. McHUGH,
Counsel for Respondent, McGrath,
70 Pine Street,
New York, N. Y. 10005.

M. E. DE ORCHIS,
Counsel for Respondent, American Export,
80 Broad Street,
New York, N. Y.

Order Denying Petition for Rehearing.

31825

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

CARLE & MONTANARI, INC.,

Plaintiff-Appellant,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and JOHN W. McGRATH CORPORATION,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
/s/ ROBERT P. ANDERSON
/s/ WILFRED FEINBERG, Judges

January 8, 1968

Order Denying Petition for Rehearing in Banc.

31825

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

CARLE & MONTANARI, INC.,

Plaintiff-Appellant,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and JOHN W. McGRATH CORPORATION,

Defendants-Appellees.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

January 8, 1968